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SUPREME COURT

IN THE

Supreme Court of the United States

October Term, 1963.

No. 285

IN THE MATTER
OF
The Proceedings Pursuant to Section 9-a (amended to Section 22) of Article VI of the Constitution

IN RELATION TO
LOUIS L. FRIEDMAN, Justice of the Supreme Court, Second Judicial District,

Appellant,

against

COURT ON THE JUDICIARY OF THE STATE OF NEW YORK, by JOHN R. DAVISON, Esq., and WILLIAM R. BRENNAN, Esq., Counsel Designated by Said Court to Conduct the Proceedings,

Appellee.

ON APPEAL FROM COURT ON THE JUDICIARY OF THE STATE OF NEW YORK.

Motion to Dismiss or Affirm and Brief in Support of Motion.

JOHN R. DAVISON,
Counsel Designated to Conduct the Proceedings,
90 State Street,
Albany 7, N. Y.

and

WILLIAM R. BRENNAN,
Counsel Designated to Conduct the Proceedings,
295 Main Street,
Buffalo 3, N. Y.

THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4131—1963

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COURT ON THE JUDICIARY OF THE STATE OF NEW YORK, by John R. Davison, Esq. and William R. Brennan, Esq., Counsel Designated by Said Court to Conduct the Proceedings,

Appellee.

ON APPEAL FROM COURT ON THE JUDICIARY OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF MOTION.

Motion to Dismiss or Affirm.

To the Honorable, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

John R. Davison and William R. Brennan counsel designated by the Court on the Judiciary of the State of New York to conduct: Proceedings Pursuant to Section 9-a (now Section 22) of Article VI of the Constitution of the State of New York in Relation to Louis L. Friedman, Justice of the Supreme Court of the State of New York, Second Judicial District—move this Court under Rule 16(1)[b] of the Rules thereof to dismiss or affirm the above entitled case on the grounds that it does not present a substantial federal question; that the federal questions sought to be reviewed were not expressly passed on by the Court on the Judiciary of the State of New York, and one was not raised in the Court on the Judiciary, and that the judgment thereof rests on an adequate non-federal basis.

Nature of the Proceedings and the Determinations Made by the Court on the Judiciary of the State of New York.

These proceedings were instituted before the Court on the Judiciary of the State of New York by the preferral, on August 15, 1962, by the undersigned as counsel designated to conduct the proceedings, of charges against appellant, Louis L. Friedman, Justice of the Supreme Court of the State of New York, Second Judicial District for his removal from his public office for abuse thereof (1) by interfering with and obstructing a judicial inquiry and investigation order by the Appellate Division of the Supreme Court of the State of New York, Second Judicial

Department; (2) by engaging in unethical and improper conduct in that while a Justice of the Supreme Court of the State of New York, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly preserving or accounting therefor and would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor; (3) by violating and failing to observe the concept, spirit and letter of the canons of judicial ethics and by causing M. Malcolm Friedman to violate and to fail to observe the canons of professional ethics.

Section 9-a (now Section 22) of Article VI of the Constitution of the State of New York provides that a justice of the Supreme Court may be "removed" by a court on the judiciary but that no judicial officer shall be "removed" except "for cause" nor unless he shall have been served with a statement of the charges alleged for his removal and shall have had an opportunity to be heard and that the trial of charges for the removal of a judicial officer shall be had before a court on the judiciary and an affirmative concurrence of not less than four of the six members of the court is necessary for the removal of a judicial officer.

A statement of the foregoing charges alleged for appellant's removal from his judicial office was duly served on appellant (R. Vol. I, pp. 3a-4a). He was afforded an opportunity to be heard and after he served and filed an answer to the charges (R. Vol. I, pp. 5a-6a) a trial was had before the Court on the Judiciary. The trial consisted of (1) the submission to the Court of 1230 printed pages of testimony and the relevant exhibits referred to therein (R. Vols. I, II, III) adduced in a disciplinary proceeding against M. Malcolm Friedman, appellant's brother upon a stipulation; That if the

witnesses whose names appear in this record were personally called to testify in this proceeding they would each testify as set forth herein (R. Vol. I, p. 7a); (2) appellant's testimony and the testimony of one of his counsel before the entire Court on the Judiciary and the exhibits referred to therein (R. Vol. IV).

Before the trial, counsel for appellant orally moved on December 10, 1962, before the entire Court on the Judiciary (1) to have eliminated from the case any reference to the income tax matter and to the Shevack negligence claim as to which testimony had been adduced in the disciplinary proceeding involving appellant's brother and (2) for dismissal of the charges in accordance with paragraph Sixth of appellant's answer viz:

> "Sixth: That the procedures for the removal for cause of a Supreme Court Justice pursuant to Article VI, Section 9-a of the Constitution of the State of New York contravene the due process clause of the Fourteenth Amendment of the Constitution of the United States inasmuch as it requires that the same body preferring the charges should hear and determine them" (R. p. 6a).

The Court unanimously denied both motions.

Appellant did not ask for, as there was no need for, a bill of particulars as to the charges alleged. The Court on the Judiciary was convened and the charges were preferred on the basis of the conduct of appellant disclosed in a report of Mr. Justice Bernard S. Meyer filed in the Appellate Division of the Supreme Court, Second Judicial Department, in the disciplinary proceeding involving appellant's brother and appellant had a copy of that report which particularized the charges in these proceedings, as the stipulated part of the record volumes I, II, and III shows. In other words appellant was not

only well advised when he was served with the charges of the particulars of them but even of the evidence against him which he eventually stipulated.

After hearing and study of the proofs of the parties as stipulated and offered and the oral arguments of counsel the Court on the Judiciary found and decided by a vote of 4 to 2:

(1) That Louis L. Friedman interfered with and obstructed a Judicial Inquiry and Investigation ordered on the 21st day of January 1957 by the Appellate Division of the Supreme Court of the State of New York Second Judicial Department;

(2) That said Louis L. Friedman engaged in unethical and improper conduct in that, while a Justice of the Supreme Court, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly preserving or accounting therefor and, moreover, would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor;

(3) That said Louis L. Friedman by his actions as to the Shevack claim violated and failed to observe the concept, spirit and letter of the canons of judicial ethics;

(4) That by the acts and omissions described in Findings Nos. 1, 2 and 3 hereinabove, said Louis L. Friedman abused his public office as a Justice of the Supreme Court of the State of New York;

(5) That said abuse of public office and said acts and omissions are sufficient cause for the removal from office of said Louis L. Friedman.

Subsequent to that decision the Court on the Judiciary *unanimously* denied a motion by appellant to vacate that decision. The grounds of the motion included all but one, the second (Jurisdictional Statement, pp. 5, 22-24) of the grounds upon which this appeal purports to have been taken.

In short, the Court on the Judiciary thrice decided contrary to appellant's first question (Jurisdictional Statement, p. 4) and first point (*id.* pp. 15-22) that it did not *as a matter of fact* act as preferrer, prosecutor and trier of the charges: First, in denying, on January 11, 1963, the oral motion of December 10, 1962, to dismiss on the ground set forth in paragraph Sixth of the answer; Second, in ordering and adjudging on February 22, 1963, that appellant be removed from his office and thereby ruling against the renewal of the motion to dismiss the charges on that ground (R. Vol. I, p. 7a); Third in denying on April 3, 1963, the motion to vacate the removal order and judgment of February 22, 1963.

The second question appellant would present on this appeal and the second point he would make, i. e., "The instant sections of The New York State Constitution violate Fourteenth Amendment due process for vagueness, in that they purport to authorize removal for 'cause' without providing any standards to define the meaning of that term" (Jurisdictional Statement, pp. 5, 22-24) ***was never*** raised in the Court on the Judiciary or expressly passed upon by that Court for reasons obvious from the serious and substantial nature of the charges.

The Court on the Judiciary decided both *as matter of fact and as matter of law* that, contrary to appellant's third question and point (Jurisdictional Statement, pp. 5, 24-26) it was a duly composed and constituted court under the provisions of the New York Constitution.

The Court on the Judiciary thrice decided, contrary to appellant's fourth question and point (Jurisdictional Statement, pp. 5, 26-27), that appellant was not *as matter of fact* tried on two charges not contained in the statement of charges served upon him and of which no notice was given to the Governor and Legislature.

Statement.

Appellant was first appointed to the office of Justice of the Supreme Court of the State of New York on October 6, 1955, and then elected to it in November, 1956 (R. pp. 1242a-1243a). Before that he had been an Assemblyman and a Senator of this State and a financially successful lawyer specializing with his brother, Malcolm, in the practice of negligence law under the firm name of Friedman & Friedman, with offices at 130 Clinton Street, Brooklyn. For the year 1955, they reported their taxable partnership income was $269,923 (R. pp. 1243a, 1247a-1249a).

The day after he was appointed to the bench, i. e., on October 7, 1955, appellant decided that his brother, Malcolm, should file a certificate that he was doing business as Friedman & Friedman and on that day Malcolm filed a business certificate certifying that he was transacting business under the name of Friedman & Friedman at 130 Clinton Street, Brooklyn (R. pp. 694a-695a, Exh. SSSSS).

The Constitution of the State of New York prohibits a Justice of the Supreme Court from practicing law (Section 20[4] Art. VI and the law which authorizes the filing of a certificate showing that a business is being transacted under an assumed name does not permit a Supreme Court Justice to evade this constitutional prohibition or

permit a lawyer to use the name of a Supreme Court Justice (New York Judiciary Law, Section 476; New York Penal Law, Section 440).

So at the very outset of his judicial career, appellant wrongfully sought to have his brother continue in the practice of the law under the firm name of Friedman & Friedman.

The next thing appellant did was to take all the financial records, past as well as current, from the Friedman & Friedman law office to his Supreme Court Chambers where he kept control and supervision over them and over the financial records of M. Malcolm Friedman's subsequent practice of the law and the financial records of their liquidation (R. pp. 659a, 691a-694a). Then, on appellant's orders, all the financial statements of M. Malcolm Friedman's subsequent practice of the law and of their liquidation account were delivered unopened to appellant at his Supreme Court Chambers (R. pp. 739a, 815a-817a). The accountant who made the entries in the books, including those of Malcolm Friedman's law business had to do so in appellant's Supreme Court Chambers and the accountant had to leave all of his work papers in appellant's chambers (R. pp. 336a, 742a-743a, 1309a).

Appellant assumed full responsibility for his brother's income tax return and supervised its preparation in his Supreme Court Chambers. Malcolm Friedman, after appellant went on the bench, had nothing to do with the financial records of his own law business or with their liquidation account or with their tax returns. This "chore," as appellant called it, of Malcolm's law business was performed by appellant. He was in complete control. His excuse for taking such control was, that Malcolm couldn't read the books if he stood on his head and since this was only a matter between himself and his brother who would know about it (R. pp. 1311a-1315a).

Early in 1961 disciplinary proceedings were brought against M. Malcolm Friedman and he has been suspended from the practice of law (*Matter of Friedman*, 17 A. D. 2d 644). Two of the four reasons for his suspension stem directly from appellant's involvement in and control over the financial records and affairs of Malcolm Friedman's practice of the law.

It is against this background that the detailed evidence supporting the charges must be viewed.

The First Charge.

The first charge was that appellant interfered with and obstructed a Judicial Inquiry into the conduct of attorneys ordered by the Appellate Division, Second Department.

On November 18, 1957, the Judicial Inquiry subpoenaed the financial records of Friedman & Friedman and M. Malcolm Friedman for the period January 1, 1953 to December 31, 1956 (Exh. 235). From that date until after disciplinary proceedings were brought against Malcolm, appellant made maneuver after maneuver to keep the financial records from the Judicial Inquiry. The chronology speaks for itself.

November 18, 1957-December 11, 1957

When Malcolm asked appellant for the books because he had to bring them to the Judicial Inquiry, appellant told him: "If you take those books in, everybody in this courtroom is going to start sticking his nose into what I got. * * * adjourn it for a couple of weeks and I will get hold of Judge Arkwright [the Justice appointed by the Appellate Division to conduct the Judicial Inquiry] and make arrangements so that they can see it in private" (R. pp. 671a-672a).

Malcolm phoned the Inquiry and asked for an adjournment of the personal and production subpoenas served on him for four or five weeks because appellant had the records in his possession and asked that they be inspected in his Supreme Court Chambers. Malcolm was told that it was the practice of the Inquiry to take subpoenaed records and have an accountant examine them but was granted a three week adjournment of the return of the subpoenas (R. pp. 475a-477a, 824a).

December 11, 1957

Malcolm sent an attorney who worked for him to get another adjournment which was granted to December 17 (R. pp. 825a, 929a-932a).

December 12, 1957

Appellant went to a Judges' dinner with Justice Arkwright.

And, here we have a direct conflict in the testimony as to what one said to the other in respect of Malcolm's subpoenas.

Appellant testified that before going to the dinner he told Justice Arkwright about the subpoenas, about his concern that everybody in the courthouse could know all about his private affairs and asked if something couldn't be worked out so the Inquiry's accountant could examine the books in appellant's chambers; that Justice Arkwright said: "We'll see"; that on the way home from the dinner he asked Justice Arkwright what Malcolm should do about the subpoenas and was told "we will work out an adjournment" and that he then told Judge Arkwright "all I want is a week and then I can work out a way with you" (R. pp. 673a-675a).

Justice Arkwright testified that he did not talk with appellant about Malcolm before going to dinner; that

on the way back appellant told him that Malcolm was to appear before him and asked "what do you want him to say"; and that he told appellant: "Whatever is the truth." Justice Arkwright also testified that he reported that conversation to Mr. Hurley, counsel to the Inquiry, and to the Appellate Division. Justice Arkwright denied that he ever talked with appellant about an adjournment let alone made any promise of one (R. pp. 497a-499a).

December 17, 1957

On appellant's instructions Malcolm appeared at the Judicial Inquiry and asked for an adjournment until some time in February. In doing so, he told Justice Arkwright that he did not have the records called for and that they were in the possession of appellant and under his control and supervision and that he, Malcolm, did not have one of the subpoenaed records which included the financial records of his own law practice and his own income tax returns (R. pp. 932a-933a, 941a-947a, Exh. 235).

In opposing an adjournment, Mr. Hurley said he had talked with Judge Friedman and the Judge had told him that he had the books, that he would not produce them, and that he would only permit an examination of them in his chambers (R. p. 943a).

Judge Arkwright then told Malcolm that the Inquiry had to have the subpoenaed records and that if anyone questioned the Inquiry's right to them the question could be tried out in another tribunal (R. p. 937a).

The Court refused Malcolm's request for an adjournment and Malcolm then testified that Judge Friedman took care of his financial business exclusively. Every record had been submitted to Judge Friedman, including the current books. Malcolm said he didn't even have a book he could check to see if someone had paid a bill

or if the office owed one; that appellant handled all the financial affairs of his (Malcolm's) office, and that he did not think that appellant was going to release the record to him (R. pp. 941a-957a).

When appellant testified before the Court on the Judiciary he admitted that *he* had decided not to deliver Malcolm's books to the Judicial Inquiry and that although he could have done so, he did not deliver them and then (as Judge Arkwright had suggested), raise the question of the Inquiry's right to custody (R. pp. 1264a-1266a).

At the disciplinary proceeding involving his brother, which is part of the stipulated record here, appellant was asked this question: "You never—in November or December 1957, the books never got over to the court?" And he gave this answer:

> "If those books ever got to the court it would have meant my fighting a couple of court officers who would physically take them away from me and I didn't intend to be put in that position, because all Judge Arkwright had to do is say, 'I hereby impound them,' and I would never have had them back" (R. p. 768a).

In short, appellant knew from the very beginning that he had no right, superior to the right of the Inquiry, to the possession of Malcolm's financial records.

If appellant had any doubt that the Inquiry could demand that he give up Malcolm's books it should have been disspelled when late in December, 1957, he went to see Justices Nolan and Murray of the Appellate Division and was told that the Judicial Inquiry was under the jurisdiction of Justice Arkwright (R. pp. 1267a-1268a).

January 8, 1958

The following article appeared in a gossip column of a newspaper:

> "A sitting jurist may be embarrassed by recv'g a call to appear before the Arkwright ambulance inquiry in B'klyn" (Exh. PPPPP).

After that, appellant (so he testified) got mad and told Malcolm he had better get a lawyer and suggested and made an appointment with Colonel Dykman, who was retained by Malcolm on January 10, 1958 (R. pp. 679a-681a).

Appellant testified to his attitude at that time:

> "Q. Now, Judge, isn't it fair to say—isn't it fair to say that if your brother Malcolm had his financial records, the financial records of his own practice from October 7, 1955, up to November, 1957, when we sought them, if he had his own records, there would have been no problem with you at all, would there? A. *Perhaps not, but whether you charge it to my pigheadedness or not, I felt I had a right to keep the records* and not surrender them, and when Colonel Dykman asked me for them the first time I wouldn't give it to him and *the only way my brother could have gotten them from me is sue me in a replevin action* and I don't think he would have gone that far. I was stubborn about them and I was stubborn against—I felt rights were being invaded which you had no right to invade" (R. p. 769a).

Although Colonel Dykman thereafter offered to make a room in his office available for the inspection of the records by the accountants for the Judicial Inquiry, it is to be noted (1) that there was no indication at that time that all books were not available (2) that the sole point then made was appellant had the subpoenaed records including Malcolm's own and was not going to turn them over to Malcolm so he could honor the subpoena,

and that appellant was aware because he was told why it was not feasible to examine the books in his Supreme Court Chambers (R. pp. 681a-685a, 798a, 516a-514a, 939a-943a). Colonel Dykman was also told that it could not be done that way—the records had to be checked against other records (R. pp. 594a-595a, 626a-634a, 958a-959a).

January 28, 1958

Another personal subpoena and a *duces tecum* subpoena calling for the production of his records and records for Friedman and Friedman for 1/1/53 through 1/31/56 were served on Malcolm (Exh. 236, R. pp. 461a, 1266a).

February 4, 1958

The return day of the January 28th subpoena, an employee of Malcolm's appeared and asked for an adjournment because Mr. Kiendl had been retained and he was tied up in another matter and an adjournment was granted (R. pp. 961a-963a).

February 18, 1958

The adjourned day, the same employee asked for a further adjournment because Mr. Kiendl was still on trial, and it was granted (R. pp. 964a-965a).

March 4, 1958

The new adjourned day, a further adjournment was granted to April 28, 1958, because of a stay in a show cause order of the Appellate Division why a similar subpoena in another matter involving another attorney should not be quashed (R. pp. 598a-599a, 635a).

April 28, 1958

Return of the subpoenas was again adjourned, this time without date on Colonel Dykman's statement that Malcolm was ill (R. pp. 966a-967a, 601a).

May 28, 1958

Counsel for the Inquiry wrote to Malcolm saying that Judge Arkwright had directed that he appear and produce his records on June 5, 1958, pursuant to previously served subpoenas.

June 5, 1958

Malcolm and his counsel, Colonel Dykman, told the Inquiry that they could not produce the books because they were in Judge Friedman's possession and he "just would not relinquish them." Speaking of his client, Malcolm, Colonel Dykman said: "He is helpless and what he has said to you, confirmed my statement that possession has been refused" (R. pp. 967a-977a).

Malcolm then testified: when he wanted money, a record was given to appellant and then a check was drawn; he signed anything appellant gave him to sign. Appellant had refused to give him even the books which related to his own practice of the law after appellant went on the bench. Appellant had said "I won't give them to you" (R. pp. 979a, 982a-983a, 988a).

June 16, 1958

Mr. Hurley, counsel for the Inquiry wrote to appellant requesting that he produce the financial records pertaining to Malcolm's law practice after appellant went on the bench, i. e., from October 7, 1955 to December 31, 1957 (Exh. 238).

June 19, 1958

Appellant answered Mr. Hurley's letter saying he would take the matter up with Colonel Dykman when the Colonel returned in July from a trip and he would then be in touch with Mr. Hurley again (Exh. 239).

September 3, 1958

A subpoena for the production on September 29, 1958, before the Judicial Inquiry of Malcolm's records from October 7, 1955 to December 31, 1957, was served on appellant, and thereafter he retained his own counsel to oppose the subpoena for the production of Malcolm's books (R. pp. 697a-698a, 1271a-1272a, Exh. 241).

September 17, 1958

Appellant's attorney appeared before the Judicial Inquiry and a question arose as to the propriety of his appearance for appellant (R. pp. 991a-997a, 1272a).

September 25, 1958

The counsel appellant had retained told him he could not appear for him (R. p. 993a).

September 29, 1958

Appellant had been subpoenaed on September 3rd to appear on this day September 29th before the Justice conducting the Inquiry and to produce Malcolm's records *and he did not do so.* Instead, the attorney appellant had retained appeared and withdrew his appearance. Thereafter, on the same day, another subpoena for Malcolm's records was served on appellant since he had ignored and failed to comply with the September 3rd subpoenas (R. pp. 991a-997a, 1272a-1237a, Exh. 242).

October 15, 1958

This was the return date of the September 29 subpoenas and again appellant did not obey them. Instead, he sent Mr. Harold Fisher for the limited purpose of requesting an adjournment which was granted (R. pp. 997a-998a).

October 21, 1958

Mr. Fisher again appeared before the Judicial Inquiry on behalf of Judge Friedman and asked for an adjournment of the subpoenas served on several banks. An adjournment was granted to October 28, 1958, the date to which the subpoenas served on Judge Friedman had been adjourned (R. pp. 999a-1015a).

October 28, 1958

An attorney from Mr. Fisher's office appeared and asked for an adjournment on behalf of Judge Friedman because Mr. Fisher had a cold. It was granted to November 12, 1958, although there is no evidence that appellant could not produce Malcolm's books (R. pp. 1015a-1019a).

Malcolm also had been subpoenaed to appear and produce his books on the same day (R. p. 1028a). He appeared with counsel who asked for an adjournment for Malcolm because Mr. Fisher had a cold and the two proceedings were tied together. He said:

> "I have just come from Judge Friedman. The information called for Mr. Malcolm Friedman's papers, *those papers are in the possession of Judge Friedman.* Judge Friedman's attitude is that as long as he is under subpoena for them he must bring them."

Thereupon, the Court told Malcolm's counsel:

> "I can't see, Colonel, how the two are interrelated at all. If the only obstacle is that the Judge wants to be released from that subpoena, I will release him, but we certainly can't put up with this situation where we are just battered from one to the other. It has gone on long enough. It will have to come to an end. I think we will proceed with the examination of Mr. Malcolm Friedman now" (R. pp. 1020a-1023a).

Malcolm testified: Judge Friedman has the records and will not produce them or give them to him to produce. The Court directed Malcolm to produce the records on November 12, 1958 (R. pp. 1028a-1037a).

November 8, 1958

Malcolm got a Justice of the Appellate Division to sign a show cause order as to why the subpoenas directed to him should not be quashed, which contained a stay of all proceedings in connection with or relating to his "family." It is to be noted that appellant made no motion to quash the subpoenas served upon him (R. pp. 1039a-1040a, Exh. 287).

November 12, 1958

This was the date to which the subpoenas for appellant's production of the records had been adjourned because of Mr. Fisher's cold. Mr. Fisher appeared and said that he had intended to move as to the subpoenas directed to Judge Friedman but had not done so because of the stay obtained by Malcolm—i. e., because the stay covered Malcolm's "family." All matters were adjourned on the basis of that stay until December 15, 1958 (R. pp. 1038a-1044a).

December 15, 1958

The Appellate Division had not decided Malcolm's motion to quash the subpoenas served on him so all matters were again adjourned to January 15, 1959 (R. pp. 1044a-1048a).

From January 15, 1959 to February 18, 1959, all matters were adjourned to give the new Justice assigned to conduct the Inquiry, Justice Baker, an opportunity to study what had been done (R. p. 1049a).

February 18, 1959

By this time the Appellate Division had denied Malcolm's motion. But, an adjournment was asked on behalf of appellant because of his counsel's, Mr. Fisher's legislative duties as member of the staff of a minority leader. The adjournment was consented to and granted *to March 6, 1959, on the assurances* of Mr. Fisher and from his client Judge Friedman that on that date the financial records of Malcolm would be turned over to the Inquiry if the subpoenas to Judge Friedman were withdrawn (R. pp. 1049a-1053a).

March 2, 1959

On behalf of appellant, Mr. Fisher produced *some* of Malcolm's books but not the bank statements and cancelled checks for his regular account, his special account and his office account. Nevertheless, Malcolm's counsel stated that so far as Malcolm was concerned everything there was to produce, was produced. And, on Mr. Fisher's assurance that Judge Friedman would testify voluntarily the subpoenas directed to him were withdrawn (R. pp. 1053a-1070a).

March 19, 1959

Mr. Hurley wrote to Mr. Fisher asking for Malcolm's missing records because the accountant had to have them in order to make an intelligent examination of the books that had been produced (R. pp. 1089a-1090a).

May 14, 1959

The Justice conducting the Inquiry was asked by its counsel to direct the banks to comply with the subpoenas for the Friedman records. Mr. Fisher, on behalf of Judge Friedman, objected on the ground that the Judge had not had his day in court as to those subpoenas. Attention is called to the fact that those were the sub-

poenas involved on Malcolm's motion to quash which the Appellate Division had already sustained and had held that the banks had to produce the records. In short, by this manoeuver, Judge Friedman challenged the Appellate Division's order denying the motion to quash the subpoenas to the banks on the untenable basis that he was not a party to the motion. The court directed the banks to comply, but sealed the records for 10 days to give Mr. Fisher an opportunity to make a motion in respect of them (R. pp. 1072a-1088a).

On that same day, May 14, 1959, Mr. Fisher was called upon to produce the rest of Malcolm's records as requested in the March 19, 1959, letter.

The Court explained to Mr. Fisher:

> "We found when we looked at the records that there were others which we must have in order to make head or tail out of those which were left" (R. pp. 1089a-1091a).

Mr. Fisher then produced employee records (R. pp. 1092a-1093a) and said:

> "*With respect to Item 1 in that letter, the canceled vouchers and bank statements for the regular, special and office accounts, my client's last month's judicial duties prevented him from looking for them* I hope judicial duties will be a little lighter in the immediate future and we will look for them."
>
> • • • • • •
>
> "If we decide not to make any application, we will certainly produce them in the next couple of weeks as soon as we can look for them" (R. p. 1094a).

The Court said:

> "Can't we fix some reasonable limit of time? I might say for the record that the Judge himself spoke with me about that and said that the records

were scattered, that he had had no opportunity to look for them, that finding them would be a very difficult task. He told me that two or three times."

"*I have a recollection that he suggested to me*, and I may not be accurate, *that it might take him all summer to locate the records and get them together*" (R. pp. 1094a-1095a).

Mr. Hurley said:

"We had a talk on the telephone not long ago and I said to Mr. Fisher, 'I think you are giving us a runaround,' and he said, 'That may be. That may be.' I think that is what we are confronted with here. I regret very much now that the subpoena *duces tecum* was withdrawn last time, otherwise I could ask your Honor now to direct that these papers be produced and I would have to subpoena Judge Friedman again in order to ask your Honor for such a direction" (R. p. 1096a).

Appellant admitted that although he had all the records, he did not even "start actually getting them together or looking to see" what he really had "until after Judge Baker had taken charge of the Inquiry" (R. p. 779a), i. e., fourteen months after the records were subpoenaed.

June 16 1959 (over a month later)

Mr. Hurley wrote to Mr. Fisher saying that the Inquiry had not yet received Malcolm's bank statements and cancelled checks for the period October 7, 1955 to December 31, 1957, and that without them the records delivered were of little value. He also asked for Malcolm's income tax returns which had been subpoenaed but not produced. And, he told Mr. Fisher that Judge Baker had put the matter on for June 24, 1959, and requested that, if the records were not produced, Judge Friedman come in and testify (R. pp. 1111a-1112a).

June 16,—June 24, 1959

Judge Friedman told Judge Baker that he would not produce any of the records. According to Judge Baker, "He (Judge Friedman) took the position that the records of Malcolm Friedman might reflect some of the affairs of Friedman & Friedman and felt that he should adhere to his position which was that he would not produce any of the records, and that we could take whatever steps we chose to compel their production, and he would oppose those steps," and indicated that *"if he were subpoenaed" he would vacate it* (R. pp. 1112a-1113a, 1123a).

Judge Baker testified:

> "Q. First, did he (Judge Friedman) suggest that you should so order the subpoena? A. Yes.
> "Q. And then it was that he said that if you did that, and the subpoena was issued to him, he would vacate the subpoena? A. Yes" (R. p. 552a).

June 24, 1959

Judge Baker "so ordered" new subpoenas to be served on Judge Friedman for the production of specified records of M. Malcolm Friedman and Friedman and Friedman for the period January 1, 1953 to December 31, 1958 (Exh. 245, R. p. 1284a).

Appellant seeks to give this Court the impression that Judge Baker would have gone along with an examination of Malcolm's books at any convenient place (Jurisdictional Statement, pp. 8-9). The fact is that Judge Baker ordered the subpoenas issued to Judge Friedman to produce the books at the Additional Special Term conducting the Judicial Inquiry. He did this because Judge Friedman had told him that he would not honor a subpoena unless Judge Baker personally ordered it to be issued.

July 3, 1959

Subpoenas ordered by Judge Baker on June 24 returnable September 9, 1959, were served on Judge Friedman. In other words, appellant was again given all summer to gather the subpoenaed records.

September 30, 1959

After consent adjournments of the return of the subpoenas from September 9th, Mr. Fisher acting on behalf of appellant produced Malcolm's tax returns for 1956 and 1957 but not for 1953, 1954, 1955, as subpoenaed, and said he would deliver the canceled checks and bank statements on October 14, 1959. He then stated:

> "Well, *Judge Louis Friedman* most respectfully and without meaning any offense, *has and will decline the invitation contained in the subpoena directed to him personally,* • • • on the ground that it is our belief that this Inquiry has no jurisdiction over him personally, in view of his position as a Justice of the Supreme Court. • • •
>
> "With respect to the subpoena *duces tecum* • • • dated June 24, 1959 • • • in reference to matters and books and records which concern themselves with my client, that for the same grounds and for the same reasons, *the invitation therein contained is respectfully declined*" (R. pp. 1124a-1135a).

October 13, 1959

Mr. Fisher offered from the possession of his client Justice Friedman some of, but not all, the subpoenaed bank statements and canceled checks of Malcolm Friedman and then said: "*These are all the checks, canceled checks and statements that my client has been able to locate to this point*" (R. pp. 1179a-1180a). Attention is called to the fact that statements and checks then produced as well as those not produced had been subpoenaed twenty-

three months before (Exh. 235) and that that subpoena called for all canceled checks and bank statements for the period January 1, 1953 to December 31, 1956.

December 14, 1959

Judge Baker rendered a decision on appellant's September 30th objection to his jurisdiction, holding that appellant had to honor the subpoenas (Exh. 265). The decision read in part: "Respondent (appellant here), has been subpoenaed as an ordinary witness. He must obey the mandate of this Court. A Supreme Court Justice has no constitutional or statutory immunity from being subpoenaed *as a mere witness with respect to facts within his knowledge concerning the conduct of others or concerning the financial records of another which are in his possession.*"

December 18, 1959

Appellant was ordered by Judge Baker to comply with the subpoenas on January 15, 1960 (Exh. 265).

January 15, 1960

The matter was adjourned over objection to *January 22* (R. pp. 1181a-1183a).

January 22, 1960

Mr. Fisher offered to produce some Friedman & Friedman books if the subpoenas and the Court's decision and order were withdrawn *and for the first time the Judicial Inquiry was told that as to the dates prior to January 1, 1955*:

> "*There were no books, there might have been checkbooks and cancelled checks which we don't have, but that we probably have the tax returns for the years 1953 and 1954,* and that if we have them we will give them to you—if we don't have them, we will get photostatic copies from the Government" (R. p. 1185a).

Mr. Fisher again made a conditional offer to produce other records if the subpoenas issued to appellant were withdrawn. The matter was adjourned to January 27, 1960 (R. pp. 1185a-1192a).

January 27, 1960

The Court accepted Mr. Fisher's conditional offer of January 22nd to produce the records if the subpoenas issued to appellant were withdrawn (R. pp. 1193a-1194a).

February 9, 1960

Appellant caused to be surrendered to the Inquiry some of the Friedman & Friedman books for 1955 and some of the liquidation account books for 1955, 1956 and 1957 (R. p. 1294a).

March 14, 1960

Appellant surrendered some bank statements and vouchers for these accounts (R. pp. 1295a-1296a, Exh. 246).

May 9, 1960

Mr. Hurley wrote to Mr. Fisher reviewing the piecemeal delivery of some of the subpoenaed records, enclosing a long list of missing records, emphasizing that prompt delivery of the missing records was imperative and offering to afford Judge Friedman an opportunity to explain why the records had not been produced. A copy of the letter was sent to Malcolm Friedman with the request that, if his income tax returns were not available, he sign an enclosed form so that they could be obtained from the Federal Government (R. pp. 1296a-1297a, 1209a-1214a).

May 27, 1960

Malcolm testified that he had no records and that he would "think" about signing an authorization to allow the Inquiry to get his Federal returns from the Government (R. 1209a-1214a).

June 3, 1960

Malcolm declined to sign an authorization for the Inquiry to get his Federal returns from the Government (R. p. 1238a).

On the hearing before the Court on the Judiciary, appellant testified that he had the records at the time and assumed full responsibility for them but said he knew nothing about Malcolm's refusal to sign the authorization until afterwards and did not counsel him to refuse the authorization (R. pp. 1292a-1303a, 1330a). However, on Malcolm's disciplinary proceeding, which is a part of this record, he testified that he *knew about the request for the authorization* but that *he saw no reason to open up more investigations* (R. pp. 750a-751a).

In other words, appellant lied in one court or the other about Malcolm's refusal to sign the authorization. The Inquiry was never able to obtain Malcolm's income tax returns for 1953 and 1954 which appellant admittedly had prepared and at one time, if not always, had copies, because Malcolm acting at the direction of appellant refused to sign the necessary authorization.

March 21, 1961

After the disciplinary proceedings were started against Malcolm, appellant unofficially delivered to Mr. McCoy, of the Judicial Conference of the State of New York, some more records called for by several subpoenas (R. pp. 1298a-1299a). However, as appellant admitted, the 1953 and 1954 records which he kept and which were called for by the 1957 subpoena issued to Malcolm were still missing as were some of the records for 1955, 1956, 1957 (R. pp. 1299a-1300a).

The foregoing facts show beyond any doubt that appellant, directly and/or indirectly (through his brother whom he counselled in his appearances*) interfered with and delayed the Judicial Inquiry ordered by the Appellate Division of the Supreme Court of the State of New York.

In the proceeding involving his brother, appellant admitted that a Supreme Court Justice who has evidence to give and who is requested to come in and give it should do so like any citizen and that he should not wait for a subpoena (R. pp. 764a-765a). Thus, by his own admissions he violated the standards of judicial conduct.

Solely as a result of his acts in violation of the canons of judicial ethics appellant caused his brother to violate the canons of professional ethics for which his brother is now being disciplined (*Matter of Friedman*, 17 A. D. 2d 644).

These facts, the accuracy of which cannot be questioned, demonstrate that appellant's retention in office was inconsistent with fair and proper administration of justice. How can justice be fairly and properly administered and the confidence of the people therein be maintained if it continues to be administered by one who deliberately delays, ignores, obstructs, flouts, impedes and threatens to prevent the administration of justice and counsels and forces another to do likewise.

Appellant was properly removed from office on the first charge alone.

And, if this Court has any doubt about this, we submit that the flimsy, inconsistent, pettifogging, trivial, dishon-

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* Appellant testified:
"[6611] Q. Just tell me: Did you talk over with your brother, Malcolm, his various appearances at the Judicial Inquiry? A. Yes.
"Q. Both before he appeared and after he appeared? A. I don't know about before each time, but I certainly talked to him about it afterward" (R. p. 744a).

est and childish excuses appellant made and continues to make for his conduct and his claim that he did nothing wrong demonstrate conclusively his lack of fitness for judicial office. Appellant would excuse his conduct on the ground that his privacy was being threatened.

Query: How was appellant's privacy threatened by a subpoena for Malcolm's records alone? Appellant would also excuse his conduct on the ground that the over three-year delay in producing such books as were produced—about 60 percentage of those subpoenaed—was because he was waiting for a ruling. Query: Why should a New York Supreme Court Justice need an elementary ruling? How many such rulings did he need? Why did he not get one promptly by producing the books and then testing, by the normal judicial process, his so-called right to keep them as against the demands of their rightful owner, his brother, and the subpoenas of the Judicial Inquiry? Why did he need *any* ruling in the face of his admission that his brother could have obtained the records in a replevin action?

The Second Charge.

The second charge was that appellant abused his office by maintaining in his chambers exclusive control over Malcolm's financial records without properly preserving or accounting therefor and by refusing to let Malcolm have them so that he could obey proper subpoenas for them.

Before appellant went on the bench he personally kept all the financial records of the Friedman & Friedman law business, except an office account for small disbursements, kept by Miss Silver, his secretary, and he prepared all income tax returns (R. pp. 652a-653a). It was not until

a few months before he was appointed to the bench that an accountant was engaged to write up the books once a month (R. p. 658a).

When appellant went on the bench he took all the financial records, *past*, as well as current with him and continued to keep and supervise, in his Supreme Court Chambers, the write-up of all the financial records of his brother's law practice (R. pp. 656a-657a, 659a, 691a-693a). All the financial statements and canceled checks were delivered unopened to him in his Supreme Court Chambers for the accounts of M. Malcolm Friedman, the M. Malcolm Friedman Special Account, the M. Malcolm Friedman regular account and the Friedman & Friedman liquidation account. The accountant had to write up all the books in appellant's chambers and from what he submitted to him (R. pp. 336a-354a, 659a-692a, 833a-835a, 841a, 850a-851a, 932a, 941a-946a, 979a). Malcolm had nothing to do with the books. He didn't know of what they consisted. He did not even know how much money he earned in a given year.

As has been pointed out above when Malcolm received a subpoena from the Judicial Inquiry for production of his books appellant refused to give them to him (R. p. 934a).

As has also been pointed out above when appellant continued from November, 1957, to September, 1958, to refuse to turn over to Malcolm his own books which the Judicial Inquiry had subpoenaed, a subpoena for Malcolm's books was served on appellant and, from that time on until February 18, 1959, appellant successfully avoided complying with that subpoena by the adjournment route and on the basis of a motion by Malcolm in the Appellate Division to quash the subpoena issued to him (Exhs. 235, 236, 238, 239, 241, 242, 287, R. pp. 671a, 681a, 697a-698a, 932a-934a, 956a, 967a-977a, 982a-983a, 988a, 997a, 999a-1015a, 1015a-1019a, 1021a, 1038a-1048a, 1271a-1273a).

On February 18, 1959, after the Appellate Division had denied Malcolm's motion, appellant assured the Judicial Inquiry that if the subpoenas as to him were withdrawn he would turn over to it Malcolm's financial records (R. pp. 1049a-1053a). Upon the withdrawal of the subpoenas, appellant turned over to the Inquiry on March 2, 1959, only some of Malcolm's records (R. pp. 1053a-1070a, 1276a). This was 16 months after they were first subpoenaed. Moreover, the records which were then surrendered were so incomplete as to be unintelligible (R. pp. 1089a-1090a). When a demand was made for other records belonging to Malcolm appellant ignored his commitment to the Court and took advantage of the withdrawal of the subpoenas as to him, first, by stalling for time and, then, by refusing to produce them (R. pp. 1072a-1123a). As a consequence, new subpoenas were ordered to be served on him on June 24, 1959 (R. p. 1284a, Exh. 245).

Although the new subpoenas were not returnable until September 9, 1959, appellant did not deliver any more of Malcolm's records until October 13, 1959. Meanwhile, he had informed the Inquiry that he would not obey the personal subpoena or the *duces tecum* one for the production of the related records of the Friedman & Friedman liquidation account (R. pp. 552a, 1134a-1139a).

By making a wholly frivolous and technical objection to the jurisdiction of the Judicial Inquiry, appellant kept possession of the other subpoenaed records until February and March, 1960, when he allowed some other records to be submitted (Exh. 265, R. pp. 1134a-1135a). And, this again was only after acceptance by the Court of his demand that the subpoenas served on him be withdrawn, i. e., he again gave his word as a Supreme Court Justice that he would do voluntarily that which he knew the law required him to do. And, again, the Court conducting the Judicial Inquiry took the word of a Supreme Court Justice (R. pp. 1181a-1194a, 1294a-1296a).

On May 9, 1960, another demand was made upon appellant for other records belonging to Malcolm. Acting as directed by appellant, Malcolm refused to authorize the Inquiry to get his tax returns from the Federal Government (R. pp. 1238a, 1292a-1303a, 1330a, 750a-751a, 774a).

As has also been pointed out, the final delivery by appellant of the subpoenaed records was not made until March 21, 1961, after the disciplinary proceedings against Malcolm were started and this left 40% not produced (R. pp. 1298a-1300a).

Although appellant continually maintained from 1957 on that he had the subpoenaed records and that it was only his so-called right of privacy which prevented him from turning them over, it was not until January 22, 1960, that the Inquiry was informed that there were no records for 1953 and 1954 (R. pp. 1185a).

The brashness of appellant's retention of Malcolm's records is matched only by his threat to act as a Supreme Court Judge and vacate any subpoena served on him and by his demand that the Inquiry come to his Supreme Court Chambers if they wanted to look at Malcolm's books.

As shown above all during the time the Inquiry was trying to get Malcolm's books, Malcolm was protesting, after consulting with appellant, that he could not obey the subpoenas to him because appellant had the records and would not give them to him. Appellant, although he kept all the financial records, gave Malcolm no accounting. Malcolm simply signed checks and income tax returns when asked to do so. Malcolm had no knowledge of what his financial records consisted—he didn't even have a copy of his income tax returns—he didn't even know how much money he made—he couldn't even look at a book in his office to see if a bill owed or owing had been paid. The accountant had no check on what went into the liquida-

tion account and what went into Malcolm's regular account. The secretary, Miss Silver, who kept the office account for small disbursements, would only keep the records for a year and then she threw them out. She testified that, although she had charge of the office account, she did not have the office account records of disbursements for 1953 through 1957 and she was never told not to destroy them (R. pp. 932a-946a, 968a-988a, 816a-817a, 336a-354a, 368a).

Appellant claims that he threw out the financial records for 1953 and 1954 after the tax returns had been audited but there is a conflict in his testimony as to when the audit occurred and when he claims he threw out the records (R. pp. 714a-715a, 727a-728a, 746a-747a, 919a-921a, 1244a, 1290a-1291a). But regardless of that conflict the fact most favorable to appellant is that he, so he says, deliberately destroyed the 1954 records within less than a year and a half after the returns were filed.

Appellant's testimony as to the missing 1953 and 1954 records was incredible and the Courts in the Malcolm Friedman disciplinary proceeding so found.

Further, until 1960 appellant hid the fact that the records did not exist (R. p. 1185a).

Appellant knew or should have known that there is no finality to a tax audit (R. p. 1292a).

Moreover, lawyers don't throw away financial records after keeping them for only a year and a few months.

As shown above appellant counselled Malcolm not to authorize the procurement of his 1953 and 1954 income tax returns.

In handling Malcolm's records appellant, as he testified, thought it was something that was between himself and Malcolm and that nobody would know about it so he saw nothing improper in his conduct (R. p. 1315a).

Appellant, in the manner in which he handled, retained and destroyed Malcolm's books, put Malcolm in a position in which he could not fulfill his duty as an attorney, and for that he is now being disciplined.

In undertaking exclusive control of the financial affairs of Malcolm's law practice from his Supreme Court chambers appellant abused his public office.

The evidence overwhelmingly establishes the second charge preferred against appellant and he was properly removed from office on that ground alone.

The Third Charge.

The third charge was that appellant abused his office by violating and failing to observe the canons of Judicial Ethics and by causing his brother to violate and fail to observe the canons of professional ethics.

Under this charge there are two specifications: one, as to appellant's assumption of the role of a lawyer (the Shevack case); the other, as to his having failed to report fully his brother's income, for which failure his brother is now being disciplined.

The Shevack Case.

A little over a month after appellant became a Justice of the New York Supreme Court he was visited at his home by a man named Schneider who told him that his grandson had been injured as a result of having been hit by a car (R. pp. 267a-268a).

Schneider also told appellant: That his estranged son-in-law had retained a lawyer; that the lawyer had informed him that the driver of the car was uninsured; that appellant's brother represented the uninsured driver; that the lawyer had told him that he could collect under his own insurance policy, and that his insurance coverage was by Fidelity & Casualty Co., and he showed appellant his policy. Schneider asked appellant to help him and appellant said he would see what he could do (R. pp. 216a-221a, 268a-269a).

The next day appellant, after he returned from the courtroom to his chambers, telephoned Mr. Herd, the President of the America Fore Group of Insurance Companies, which included Fidelity and Casualty Co., and said he wanted to ask him a question about the uninsured motorist coverage (R. pp. 99a-100a, 269a).

This was coverage which the insurance companies had voluntarily assumed only a short time earlier to discourage the enactment by the New York Legislature of compulsory insurance legislation. By it a policyholder or a member of his family living with him is covered for damages caused by the negligence of an uninsured driver (R. pp. 8a-10a, 62a).

The secretary of the company, Mr. Lusby, was with Mr. Herd at the time, and, since Mr. Lusby knew more about that coverage, Mr. Herd turned the phone over to him (R. pp. 99a-100a, 107a-110a, 269a).

The testimony of Mr. Lusby and appellant is contradictory as to the conversation that followed. Mr. Lusby testified that appellant said that he had a question regarding coverage on which he would like his opinion on a factual situation; *that the case did not involve his company,* i. e., one of the *America Fore Group* so he, Lusby, could talk freely. Mr. Lusby also testified that appellant

did not tell him that Malcolm represented the uninsured driver (R. pp. 108a-109a, 128a, 123a). Appellant, on the other hand, testified that he told Mr. Lusby that his company had issued the policy involved and that Malcolm represented the uninsured driver (R. p. 270a). On this point of credibility we submit that the Court on the Judiciary could properly accept Mr. Lusby's disinterested version and not appellant's.

We further submit that appellant's conduct in calling the President of the America Fore about a private claim and in saying what Mr. Lusby testified he said constituted an abuse of his judicial office.

Prior to appellant's telephone call to Mr. Herd the Fidelity and Casualty Company had received a letter from a Mr. Palmer, the lawyer retained by the father of the injured child, notifying it of the claim under the uninsured motorist provision of the grandfather's insurance policy (R. pp. 16a-18a, 30a, Exh. 7). On the day appellant called the president of the insurance company there was written on this letter a note that the President, Mr. Herd, had received a call from Judge Friedman about the case (R. pp. 28a-30a). The company assigned a Mr. Gardner to investigate the case and he made two reports which are exhibits in this case (Exhs. 23 and 24). The day after appellant's call to Mr. Herd, Mr. Gardner visited the assured, Mr. Schneider, and found that there was considerable doubt as to whether the grandson was a member of the grandfather's household or lived in a separate apartment (Exh. 23). During Mr. Gardner's visit the assured, Mr. Schneider, called Judge Friedman and consulted him about a statement Mr. Gardner had asked Schneider to sign (Exh. 23). Mr. Gardner then talked on the phone to Judge Friedman about the statement and Judge Friedman insisted that the statement be given to the assured for delivery to him, Judge Friedman, before

it was reported to the office (Exh. 23). At that time appellant told Gardner that he was not pleased with Mr. Palmer being in the case (Exh. 23).

Appellant testified to having talked to Mr. Gardner on the phone and to having told him to give the statement to Schneider so appellant could see it and decide if it was all right (R. p. 271a). Appellant also testified to having told Mr. Gardner to take the claim form to Miss Silver in his brother, Malcolm's, office and that he, appellant, would give her the information, i. e., tell her how to fill out the claim form (R. pp. 271a-272a). All of which was done in accordance with appellant's directions (R. p. 272a). Appellant, after seeing the statement, advised Schneider that it was all right and to sign it (R. p. 272a). The forms were delivered to and returned by Miss Silver (R. pp. 272a, 255a, 258a).

About a week after Mr. Gardner visited Mr. Schneider, he was in Schneider's drugstore making a purchase and Schneider told him he did not know what to do—that Judge Friedman wanted him to sign an affidavit withdrawing Palmer from the case and that he, Schneider, did not want Palmer withdrawn because it would widen the rift between his daughter and his son-in-law, but that Judge Friedman was adamant (Exh. 24, R. pp. 183a-190a).

Mr. Madigan, the Claims Manager for America Fore, testified that Mr. Schneider's statement was received in a Friedman & Friedman envelope (R. pp. 32a-34a, Exh. 8). Miss Silver testified that Judge Friedman gave her some information on this matter and that she filled out the forms and sent them in with some letters on Malcolm's letterhead (R. pp. 255a-258a, Exhs. 8, 9, 10, 11, 12, 13, 19). From the forms and the letters it is clear that they were the product of Judge Friedman as was conceded (R. pp. 58a, 19a).

About two months after Judge Friedman called Mr. Herd and after he had talked with Mr. Gardner, Miss Silver, the Judge's secretary, called Mr. Madigan, the Claims Manager, and asked him if he was ready to discuss with Judge Friedman the settlement of the child's case and she was told by Mr. Madigan that Mr. Palmer was the attorney for the child's father (R. p. 37a). Two days later, Judge Friedman called Mr. Madigan and told him that Mr. Palmer wasn't in the picture (R. pp. 37a-38a). Whereupon, Judge Friedman was told that Mr. Palmer had a letter in the file and until it was withdrawn he would have to be regarded as the attorney for the child (R. p. 38a). Six months later Judge Friedman again called Mr. Madigan and told him that Mr. Palmer had been removed from the case. When Mr. Madigan asked if he could confirm that by calling Mr. Palmer he was told by Judge Friedman not to call Palmer but to take his, the Judge's, word for it (R. p. 39a). However, during the six months between Judge Friedman's first and second call about Palmer, Madigan had called Palmer and Palmer had then used some explosive language and had said some uncomplimentary things about Judge Friedman and had said that as far as he was concerned he represented the child (R. pp. 40a-45a, 81a-83a). Notwithstanding that appellant had told Mr. Madigan not to call Palmer he did and was told by Palmer: "I'm not off the case and that so and so is not going to put me out" (R. pp. 82a-83a).

Nevertheless, Mr. Madigan called Judge Friedman and discussed the value of the case. Madigan offered $1,500. Appellant got mad. Madigan raised it to $1,800. Appellant said he was too low. Madigan raised it to $2,000. Appellant said he was still too low but would recommend the figure to Mr. Schneider. Two days later Judge Friedman called Mr. Madigan and said that Mr. Schneider wanted $5,000 but that he, Judge Friedman, thought the company ought to pay $3,500. Madigan said no. Judge

Friedman then asked for $3,000. Madigan said $2,500, plus the medical expenses. Judge Friedman said he would recommend that to Mr. Schneider. So the case was settled for $2,500 plus $596 medical expenses, i. e., $3,096, as the result of appellant's negotiation with an insurance company which might have had cases before him (R. pp. 45a-47a, Exh. 5, R. pp. 14a-15a, 663a-664a, 666a). Is it any wonder that the Court on the Judiciary rejected appellant's claim that his role in these negotiations was *simply* that of a mediator.

Mr. Palmer testified that after Madigan's second call he determined to step out of the case. He said:

> "I determined at that time after receiving this call that I might just as well step out of it and forget it, which I did. * * * *I felt that I was a young practicing attorney and I hoped to make a career for myself here and there was just no sense in going ahead with a case where I was going to antagonize a Supreme Court Judge.*"

Appellant's position is that he sees nothing wrong in his negotiation of this claim with the insurance company, a litigant with many cases in the Supreme Court in his district, that this was a perfectly innocent incident, and that by no stretch of the imagination could he be regarded as having been engaged in the practice of law because, as he points out, he received no fee (Jurisdictional Statement, p. 13).

We submit that in negotiating this settlement, in advising Mr. Schneider of his rights and the infant's rights and in supervising the preparation of the necessary papers, appellant engaged in the practice of the law in violation of the prohibitions in the New York State Constitution and the fact that he did not get a fee for it is wholly immaterial, and that the Court on the Judiciary properly held:

> "That said Louis L. Friedman by his actions as to the Shevack claim violated and failed to observe the concept, spirit and letter of the canons of judicial ethics."

and that his conduct constituted an abuse of his office and sufficient cause for his removal from it.

Appellant also abused his office by acts which cause his brother, Malcolm, to be found guilty and disciplined for failure to report income. However, since the Court on the Judiciary made no mention of the evidence in respect thereof, there is no occasion to refer to it here.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

I.

Appellant had no constitutional right to his office.

Contrary to the assertion in the Jurisdictional Statement at page 15, appellant did not have a right under the Constitution of the United States to the office of Justice of the Supreme Court of the State of New York. As this Court said in *Wilson vs. State of North Carolina*, 169 U. S. 586, 593, 596:

> "The only question for us to review is whether the state, through the action of its governor and judiciary, has deprived the plaintiff in error of his property without due process of law, or denied to him the equal protection of the laws.
>
> "We are of the opinion the plaintiff in error was not deprived of any right guaranteed to him by the Federal Constitution, by reason of the proceedings before the governor under the statute above mentioned, and resulting in his suspension from office.

> "The procedure was in accordance with the Constitution and laws of the state. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held. What kind and how much of a hearing the officer should have before suspension by the governor was a matter for the state legislature to determine, having regard to the Constitution of the state. The procedure provided by a valid state law for the purpose of changing the incumbent of a state office will not in general involve any question for review by this court.
>
> "A law of that kind does but provide for the carrying out and enforcement of a policy of a state with reference to its political and internal administration, and a decision of the state court in regard to its construction and validity will generally be conclusive here. The facts would have to be most rare and exceptional which would give rise in a case of this nature to a Federal question."

citing and quoting from *Allen v. Georgia*, 166 U. S. 138.

We are not dealing here with the barring of a person from public office by a state-imposed criteria forbidden by the Constitution of the United States as in *Torcaso v. Watkins*, 367 U. S. 488, cited by appellant (p. 15). Appellant was not removed because of his belief or lack of belief in religion. Nor are we dealing here with the removal of a person from public office for having invoked the privilege against self-incrimination under the Fifth Amendment as in *Slochower v. Board of Education*, 350 U. S. 551, cited by appellant (p. 15). Appellant was not removed because he invoked a constitutional privilege. And, we are not dealing with the disqualification of a person from public office because of membership in some organization as in *Wieman v. Updegraff*, 344 U. S. 183, cited by appellant (p. 15). Appellant was not removed because he was a member of some organization.

We are dealing only with whether appellant had under the Federal Constitution a right to continue to be a Justice of the Supreme Court of the State of New York despite the conduct of which he was found guilty after notice of the charges in respect thereof and the fullest kind of a hearing thereon. Stated in the language of this Court in the *Slochower* case, *supra* (p. 555), the only possible issue here is whether the terms laid down for appellant's continuance in his office by Section 9a (now Section 22) of Article VI of the New York Constitution were "reasonable, lawful and non-discriminatory."

Certainly this Court is not going to hold that it is unreasonable, unlawful or discriminatory for a State to demand that its judicial officers refrain from abusing their offices (1) by interfering with and obstructing a Judicial Inquiry and Investigation properly ordered by an Appellate Court (2) by engaging in unethical and improper conduct in maintaining in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the law firm of which he was a member and of the successor law office without properly preserving or accounting therefor and in refusing to surrender the same on reasonable and proper demands (3) by violating the concept, spirit and letter of the canons of judicial ethics in negotiating the settlement of a claim against an insurance company on behalf of the claimant in the face of a specific prohibition against the practice of law by judicial officers.

Jurisdiction would only exist in this Court in a case such as this one where "there had been; by reason of the statute and the proceedings under it such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were

suffered to remain, the party aggrieved would be deprived of his life, liberty or property in violation of the provisions of the Federal Constitution," otherwise this Court would have jurisdiction "to supervise and review the political administration of a state government by its own officials and through its own courts." *Wilson v. State of North Carolina,* 169 U. S. 586, 596.

Even if appellant's removal had been in violation of state law, which we shall show is clearly not so, no substantial federal question would be presented. In *Snowden v. Hughes,* 321 U. S. 1, 7, this Court said:

> "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. *Taylor & Marshall v. Beckham,* 178 U. S. 548. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, *Cave v. Newell,* 246 U. S. 650, as we reaffirm it now."

Appellant's right to be a Justice of the Supreme Court of the State of New York is derived solely from State law. In fact, it is derived from the Article of the New York Constitution part of which he here challenges. Appellant took office under and continued therein subject to being removed in accordance with the procedures prescribed by Article VI of the New York State Constitution. (For the information of this Court the history of these procedures is set forth in an appendix to this brief.)

II.

Even if appellant had some right to the office of Justice of the Supreme Court of the State of New York within the protection of the Due Process Clause of the 14th Amendment, the Procedure of Article VI of the New York State Constitution is due process of law and appellant has had it.

Section 22 (formerly Section 9a) of Article VI of the New York Constitution sanctions removal by the Court on the Judiciary of a Justice of the Supreme Court only for cause and after due notice and hearing thereon. Such a hearing is not rendered a fiction by a construction of that section as authorizing the Court on the Judiciary to pass preliminarily on the sufficiency of the facts brought to its attention for the purpose of determining whether cause exists for the preferral of charges. The power of the Court in this respect is the same as the power of the Courts in the disciplining of their officers.

In *Randall v. Brigham*, 7 Wall. 523, 540, this Court said:

> "All that is requisite to their validity is that when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney, of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

In *Ex Parte Wall*, 107 U. S. 265, this Court said:

> "It is contended, indeed, that a summary proceeding against an attorney to exclude him from the practice of his profession on account of acts for which he may be indicted and tried by a jury, is a violation of the 5th Amendment of the Constitution, which forbids the depriving of any per-

son of life, liberty, or property without due process of law. But the action of the Court, in cases within its jurisdiction, is due process of law. It is a regular and lawful method of proceeding, practiced from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution, it is certain, that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney.

"We have seen that, in the present case, due notice was given to the petitioner, and a trial and hearing was had before the court, in the manner in which proceedings against attorneys, when the question is whether they should be struck off the roll, are always conducted."

III.

Article VI, Section 22 (formerly Section 9a), of the Constitution of the State of New York does not make the Court on the Judiciary both the accuser and judge in proceedings thereunder.

Under the present Constitution of New York State the primary function of the Court on the Judiciary is to determine on the record presented either by trial or by stipulation whether cause exists for the removal from office of a judge or justice against whom charges of removal have been preferred. Contrary to the assertions made by appellant the New York Constitution does not make the Court on the Judiciary the preferrer and prosecutor of such charges.

In giving the Court on the Judiciary the power to designate an attorney or attorneys at law to act as counsel to conduct the proceedings it was the plain intent of the framers of the New York Constitution and of the

People of New York in approving the provision that the charges should be preferred, i. e., brought as adversary parties as they have been here, by counsel designated to conduct the proceedings.

Such procedure was obviously patterned on the long established and judicially approved procedure in disciplinary proceedings against attorneys who are also officers of the courts (New York Judiciary Law, Section 90).

The Constitution also gives the Court on the Judiciary the power to make its own rules and procedures for investigation and trial of a judicial officer. Pursuant to that authority the Court on the Judiciary adopted rules of practice, Rule V of which provides that upon convening of the Court it shall determine, preliminarily, whether the complaint for removal states facts sufficient to constitute a cause for the preferral of charges for removal and whether the charges which counsel designated to conduct the proceedings proposes to prefer are in a form fairly permitting answer.

In providing for such rule making power, the New York Construction did not intend that the Court on the Judiciary should be both accuser and judge and in exercising such power by the adoption of a rule that it make a preliminary determination as to the sufficiency of the complaint and the adequacy of the notice to be given that court did not place itself in a dual role of accuser and judge. A determination that such a complaint is sufficient to warrant the preferral of charges does not amount to the prejudging of such charges on the merits any more than does the denial of a motion to dismiss a complaint in a civil action for insufficiency. If there could be any doubt as to the extent of that court's action under Rule V it is dissipated by Rule VI which states what the court shall do after reaching a determination as to sufficiency of the complaint.

Like preliminary inquisitions as to whether disciplinary proceedings should be brought the considerations of the court under Rules V and VI are incidental and quasi administrative because the implied power to make such preliminary determination is a concomitant of the constitutional duty to consider charges of removal and the evidence adduced with respect thereto *(People ex rel. Karlin vs. Culkin,* 248 N. Y. 465, 479; *Matter of Richardson,* 247 N. Y. 401, 413).

The power to determine preliminarily whether there is a basis for a charge being preferred is for the protection of the person involved and not for the purpose of prejudging him.

Apart from misconstruing the New York State Constitution as requiring the Court on the Judicial to prefer charges for removal, appellant has not shown that as matter of fact that court did so and has not in any factual way brought into question the impartiality of the members of that Court, except in respect of their performance of the incidental duty of determining preliminarily the sufficiency of the charges and the adequacy of the notice and statement thereof for purpose of permitting answer. There is here no assertion, let alone proof, that the members of that Court had acquired extraneous knowledge of the facts yet to be presented. The open-mindedness of the members of the Court is conceded. Only their incidental knowledge of the reason or basis for the charges for procedural purposes is sought to disqualify them and such disqualification is sought to be accomplished only upon the innuendo that human frailty prevents the judicial mind from understanding that a charge of wrongdoing is not the equivalent of proof. This inference challenges not only the Court on the Judiciary's impartiality but also the impartiality of all our judicial procedures, both civil and criminal. It

suffices to say that if such human frailty is sufficient to establish bias and prejudging on the part of a judge who passes upon the sufficiency of a complaint in a civil action or an indictment or information in a criminal action then all our civil and criminal procedures fail to meet the test of due process. And that is true also of this Court's practice of noting probable jurisdiction.

We have been able to find only one instance in which an argument has been made comparable to the argument made in the brief for appellant. In the course of the Judicial Inquiry under the order of the Appellate Division, Second Department, which gave rise to these proceedings, subpoenas *duces tecum* were issued calling for the production of certain records before the Justice conducting the inquiry as an Additional Special Term. A motion to quash was made before another Justice holding a regular Special Term and a cross-motion was made to refer the principal motion to the Justice conducting the Judicial Inquiry.

Mr. Justice Hart denied the cross-motion (*Matter of Judicial Inquiry*, 14 Misc. 2d 863, 865-866), and in an opinion mentioned an argument that it would be unfair and improper to refer the principal motion to the Justice conducting the inquiry and cited *Sharkey vs. Thurston*, 268 N. Y. 123. (That was the case in which the Court of Appeals, while saying that "no man may be both accuser and judge," held that a Mayor who preferred charges against his appointees as Police Commissioners could also hold the required hearing thereon because in doing so he acted "not as a judge, but as an administrative officer.")

After Mr. Justice Hart's decision the Appellate Division, Second Department, ruled that motions made to quash subpoenas issued out of the designated Additional Special Term should be made to that Term and not to

another Special Term (*Matter of Judicial Inquiry*, 6 A. D. 2d 723, 724). Thus, the Appellate Division rejected the argument that the Justice conducting the Judicial Inquiry would be in such a case both accuser and Judge. This decision was entirely correct because in such a case it is the attorney appointed by the court to aid the Justice designated to conduct the Judicial Inquiry who issues the subpoenas, not the court.

We submit that the foregoing situation is analogous to this one in that counsel designated to conduct these proceedings preferred the charges, not the court.

It is to be noted that there is no provision in Article VI of the New York State Constitution that there has to be a complainant in order to convene the Court on the Judiciary. The Chief Judge of the Court of Appeals may do so upon his own motion and must do so on the written request of the Governor or a Presiding Justice of any Appellate Division, or a majority of the Executive Committee of the New York State Bar Association. However, if these provisions of the New York State Constitution are construed as requiring that there be a complainant in the first instance then the Presiding Justice of the Second Department undertook that role by his letter of July 2, 1962, in which he asked the Chief Judge of the Court of Appeals to convene the Court on the Judiciary in this instance.

The argument in support of the assertion at page 15 of the Jurisdictional Statement that the Court on the Judiciary was here the preferrer, prosecutor and trier of the charges is wrong in fact and in law. The Court on the Judiciary did not prefer the charges and did not prosecute them. It tried them.

The State Constitution does not mandate that that Court prefer such charges. Proceedings under Section

9-a of Article VI of the State Constitution as added in 1947 (now Section 22) are not in the nature of impeachment or punitive. The procedure thereunder where not expressed is clearly implied. It is implicit in Section 9-a of Article VI that counsel designated to conduct the proceedings shall prefer the charges, that in doing so their act is not the act of the Court but the act of the adversaries in the proceeding and that the members of the Court shall not be disqualified from finally determining the charges by making a preliminary determination as to the existence of facts sufficient to constitute cause for their preferral. The manifest intent of the framers of that section of the New York State Constitution was that the Court on the Judiciary should have the power to determine the physical, mental and ethical fitness of certain judicial officers to continue to perform their public trust and that that Court should in doing so, as it did here, comply with the reach of the 14th Amendment as to adequate notice and hearing.

Without any basis in fact and in disregard for the facts, appellant is here attempting to indirectly interject in these proceedings an issue as to the qualifications of the members of the Court on the Judiciary to determine the charges preferred against him.

The case of *In re Murchison*, 349 U. S. 133, relied upon by appellant (pp. 16-17), is not in point. There this Court held that a state law which permitted a Judge to act as a grand jury and then try the very persons accused as a result of his investigations constituted a denial of the fair and impartial trial required by the due process clause of the 14th Amendment. This Court in that case said: "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." As shown above, this Court on the Judiciary was not and could not be prosecutor of the

charges which were preferred against appellant by counsel designated to conduct the proceedings.

Appellant's citation of and quotation from *The Queen v. The London County Council,* 1 Q. B. 190, exceeds the bounds of ethical advocacy and, in fact, the clearly implied assertion in its citation and quotation is insulting in that it intentionally impugns without any justification the honesty and integrity of the Court on the Judiciary and that of counsel designated to conduct the proceedings. That case involved the hiring by some judicial officers of counsel specifically to plead their views before their own judicial colleagues.

On behalf of the Court on the Judiciary and on their own behalf counsel designated to conduct these proceedings, all of whom have been made parties appellee in this Court by appellant, assure this Court as officers of it and as judicial officials of the State of New York that neither the Court on the Judiciary nor any member thereof employed counsel designated to plead their personal prejudged views. If there is any doubt as to the unethical intent of appellant and his counsel in citing the case of *The Queen v. The London County Council,* it must dissipate in the face of their argument at page 15 that counsel designated are paid fees and expenses on order of the Presiding Judge of the Court on the Judiciary. Counsel who conducted these proceedings were employed to do so by the State of New York on order of the Court on the Judiciary as authorized by the Constitution of the State of New York. The fact that the case of *The Queen v. The London County Council* is cited and quoted from by appellant indicates appellant's general callous disregard of truth. 1238 of the 1379 pages of the record upon which the Court on the Judiciary made its decision were stipulated by appellant and the balance consists of appellant's unrestricted testimony on his own behalf. In other words, the case was submitted to the

Court by counsel designated to conduct it on proof agreed to by appellant and his own testimony.

The question in *Matter of Richardson,* 247 N. Y. 401, cited by appellant at page 21 was whether the governor acting pursuant to a state statute could direct a Justice of the Supreme Court of the State of New York to hear charges for the removal from office of the president of the Borough of Queens and to report to the governor the evidence taken and the findings thereon. The Court of Appeals held that this was an attempt to charge a Justice of the Supreme Court with the performance of nonjudicial duties. The New York Court held that the Legislature did not have the power to charge a Justice of the Supreme Court with the duties of a prosecutor in aid of the executive and that a Justice of the Supreme Court is disqualified while retaining office from acting as the delegate of the governor under the prohibition contained in Article VI of the State Constitution against a Justice of the Supreme Court holding any other public office or trust. (See Section 20 of Article VI of the New York Constitution.)

The holding in *Amos Treat & Co. v. Securities and Exchange Commission,* 306 F. 2d 260, cited by appellant at pages 18-19 is not in point, but a statement made therein is in point. There the Court held that a member of the investigating or prosecuting staff of the commission who participate in a decision of the Commission that an in- could not participate in deciding that proceeding upon later being made a Commissioner. This the Court held would violate the prohibition contained in 5 U. S. C. Section 1004(c) Act of June 11, 1946, c324, Section 5, 60 Stat. 239 because the exclusion clause therein that it did not apply to a member of an agency was inapplicable. The Court construed the exclusionary sentence as (p. 266) "intended to permit one who is a Commissioner to participated in the initiation of an adjudicatory proceeding

vestigation go forward and even that charges be filed to the end that an adjudicatory proceeding might be initiated." That was all that the Court on the Judiciary did here. In the federal statute involved in the *Amos Treat* case Congress permitted a member of the Commission to participate in the preliminary determinations whether there should be an investigation and whether charges should be filed and also to participate in the ultimate decisional process. The section of the New York Constitution here involved does no more than that in respect to members of the Court on the Judiciary. It does not make the members of the Court the complaining parties before themselves. Counsel designated to conduct the proceedings are the complaining parties. So the *Schlesinger Appeal*, 404 Pa. 584, cited by appellant at pages 19-20 is also not in point.

IV.

Neither appellant's proposed Question 2 nor his argument, Point II, in support thereof was mentioned in the Court on the Judiciary. In any event Question 2 is not presentable and the argument in support thereof is without merit.

Appellant questions and argues whether the provision in the New York Constitution authorizing removal for cause is so vague and without standards as to offend the Constitution of the United States. To state the propositions is to show that it is untenable. But apart from its facial defect it is not true.

Of course, "cause" for removal was intended to mean something substantial. As the Court of Appeals said in *People ex rel. Munday v. Fire Commissioners*, 72 N. Y. 445, 449, speaking of a similar provision in a statute:

> "This necessarily implies that the 'cause' is to be some dereliction or general neglect of duty, or incapacity to perform the duties, or some delinquency affecting his general character and his fitness for the office. The cause assigned should be personal to himself, and implying an unfitness for the place, and such cause being assigned, if unexplained, the removal may be made."

The test of whether sufficient "cause" for removal exists is: Do the acts charged against an officer, "justify the finding that his future retention of office is inconsistent with fair and proper administration of justice which the law entrusts to him" (*Matter of Droege*, 129 App. Div. 866, 882).

The case of *Cramp v. Board of Public Instruction*, 368 U. S. 278, relied upon by appellant (pp. 23-24) has nothing to do with this case because the facts and the applicable law are wholly dissimilar.

But even if the New York Constitution, despite its history as to cause for removal of a judicial officer (see Appendix to this brief) is vague, there is nothing vague as to the grounds upon which the charges for and decision of removal were based. From the outset appellant knew from the record in his brother's disciplinary proceeding the causes which existed for his removal from office.

V.

The reach of federal due process does not extend to the composition and constitution of a state court for the removal of state officers under state law; but even if it does, the Court on the Judiciary which removed appellant from his state office for cause, after notice and hearing, was duly composed and constituted and appellant has had due process.

As heretofore shown this Court has decided time and time again that federal due process does not extend to the manner in which state citizens are entitled to state offices or, if given notice and an opportunity to be heard, removed therefrom. *Snowden v. Hughes, supra,* 321 U. S. 1; *Cave v. Newell, supra,* 246 U. S. 650; *Taylor & Marshall v. Beckham, supra,* 178 U. S. 548; *Wilson v. State of North Carolina, supra,* 169 U. S. 586; *Allen v. Georgia, supra,* 166 U. S. 138.

Appellant's argument that the Court on the Judiciary "was not duly composed" is silly. The Court was composed of the six Judges specified by Section 9-a, paragraph 1 (now Section 22, paragraph b), of Article VI of the New York Constitution viz: the Hon. Charles S. Desmond, Chief Judge of the Court of Appeals, the Senior Associate Judge of the Court of Appeals, Hon. Marvin R. Dye, one Justice of each of the four Appellate Divisions, First Judicial Department, Hon. Benjamin J. Rabin; Second Judicial Department, Hon. Arthur D. Brennan; Third Judicial Department, Hon. William H. Coon; Fourth Judicial Department, Hon. Earle C. Bastow. There is no question that each was properly a member of the Court on the Judiciary, each of the Judges of the respective Appellate Divisions having been duly designated thereto by the Courts of which they were members; the Chief Judge and the Senior Associate Judge of the Court

of Appeals having been specifically designated by the Constitution. All heard and unanimously decided the first motions in the proceedings—appellant's oral motions on December 10, 1962, (1) to dismiss the charges and (2) to eliminate from the specification of the charges shown in the record of the M. Malcolm Friedman disciplinary proceedings (a) the so-called Shevack matter and (b) the failure to report income matter; all heard the testimony adduced by appellant in open court on January 11, 1963 (his own and one of his counsel's testimony); all heard the oral arguments of counsel on both sides on February 22, 1963, and all participated in the decision, four voting for removal (the majority required by the New York Constitution) and two voting to dismiss the charges on the merits (and not on the ground of insufficiency on their face or for any lack of procedural due process).

Appellant's sole complaint under his Point III (pp. 24-26) is that two of the six Judges of the Court on the Judiciary were not present on August 15, 1962, the day the Court met to consider whether these proceedings should be brought against appellant.

Prior thereto by letter dated July 2, 1962, Hon. George H. Beldock, Presiding Justice of the Appellate Division of the Supreme Court, Second Judicial Department, under the authority vested in him by Article VI of the Constitution of the State of New York (Section 9-a, subd. [4]; now Section 22, para. d), requested Hon. Charles S. Desmond, Chief Judge of the Court of Appeals to convene the Court on the Judiciary to consider matters involving the conduct of Louis L. Friedman, a Justice of the Supreme Court of the State of New York, Second Judicial District, which were disclosed in a report of Mr. Justice Bernard S. Meyer filed in the Appellate Division of the Supreme Court, Second Judicial Depart-

ment, in a proceeding entitled "In the Matter of M. Malcolm Friedman, an attorney, Denis M. Hurley, Petitioner; M. Malcolm Friedman, Respondent."

On August 15, 1962, Chief Judge Desmond of the Court of Appeals convened the Court on the Judiciary as mandated by Article VI of the Constitution of the State of New York (Section 9-a, subd. [4]; now Section 22, para. d). At that time the Court by orders adopted rules, appointed a clerk of the court and designated counsel to conduct the above entitled proceedings and determined preliminarily that sufficient facts as to the conduct of Hon. Louis L. Friedman, Justice of the Supreme Court, Second Judicial District, were disclosed in the report of Mr. Justice Bernard S. Meyer in the proceeding "In the Matter of M. Malcolm Friedman, Attorney" for the preferral, by counsel designated to conduct the proceedings, of charges for Louis L. Friedman's removal from office for abuse thereof, and that the form of the charges proposed by counsel fairly permitted answer.

Two of the Judges designated as members of the Court on the Judiciary were not present on that day, Judge Dye and Justice Rabin. However, the preliminary orders and preliminary determinations were made upon the vote therefor of all four of the members present. Section 9-a (now Section 22) of Article VI of the New York Constitution does not require that all members of the Court on the Judiciary have to be present when any action is taken by the Court. Nor does it specify the number required for a quorum. It simply provides:

> "*The trial* of charges for the removal of a judicial officer or of the grounds for his retirement shall be had before a court on the judiciary. The affirmative concurrence of not less than four members of the court shall be necessary for the removal or retirement of a judicial officer."

It further provides:

> "The court shall have power (a) to designate in each case involving a judicial officer an attorney or attorneys at law to act as counsel to conduct the proceeding; (b) to summon witnesses to appear and testify under oath and to compel the production of books, papers, documents and records before such counsel in advance of the trial and before the court upon the trial; (c) to make its own rules and regulations concerning the procedure to be adopted for the investigation and trial of a judicial officer * * *."

Among the rules which the Court adapted on August 15, 1962 were the following:

Rule I

> "Four members of the court shall constitute a quorum and the affirmative concurrence of four shall be necessary for a decision except that where less than four members of the court shall vote in favor of the removal or retirement of a judicial officer, an order shall be entered dismissing the proceeding."

Rule V

> "Upon convening of the court, it shall determine, preliminarily, whether the complaint for removal or grounds for retirement of a judicial officer that have been presented, state facts sufficient to constitute cause for the preferral of charges for removal or ground for retirement; and are in form fairly permitting an answer."

Rule VI(a)

> "If such complaint for removal or grounds for retirement are determined sufficient within Rule V, the court shall direct that a statement of the charges alleged for removal or of the grounds alleged for

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retirement be personally served on the respondent, who shall within twenty days of such service, file his answer with the clerk of the court and serve a copy on counsel, if any, designated by the court to conduct the proceeding."

The rule that four members shall constitute a quorum was proper because the concurrence of four out of six judges is all that the New York Constitution required to remove a judicial officer. And four here decide that there was a basis for charges being preferred against appellant. There is no suggestion that in so deciding those four Judges acted on any personal basis or not on the record in the M. Malcolm Friedman disciplinary case which caused the Presiding Justice of the Second Judicial Department to request the convening of the Court on the Judiciary. As a matter of fact one of the Judges who voted that there was a basis for preferral of charges voted after hearing and studying the evidence presented that the charges should be dismissed on the merits (Justice Brennan).

It is significant that no authority is cited by appellant for the proposition that he was denied due process under the Constitution of the United States by reason of the fact that two of the Judges of the Court were not present when the preliminary procedural steps were taken in initiating these proceedings. Of course appellant did not object to the composition of the Court as he admits because his motion to dismiss the charges, his testimony, the summation of counsel for both sides and the conferences of the Court which resulted in the denial of the motion to dismiss the charges and the order of removal were attended by all six judges of the court. Nor is there any merit to appellant's claim that he was misled. The minutes of the court were available to him. And in any event it was no secret that Judge Dye was at the American Bar Association meeting in San Francisco and Justice Rabin was in Europe. Ap-

pellant knew or should have known this but whether he did or not is unimportant. He had an opportunity to raise the question, did so, and it was decided against him.

As the Court held in denying appellant's motion to vacate the order of removal:

> "The Court on the Judiciary was duly convened pursuant to the Constitution and at all its sessions there were present members sufficient to constitute a quorum under the court's rules adopted pursuant to the provisions of the Constitution."

The main point here is that it is a matter of state law whether the Court on the Judiciary of the State of New York was "duly composed and constituted" and the Courts of New York have held it was and that should end the matter so far as this Court is concerned (*Kovacs v. Cooper*, 336 U. S. 77, 84-85; *Lovell v. Griffin*, 303 U. S. 444; *Winters v. New York*, 333 U. S. 507, 514), particularly in view of the fact that appellant unquestionably and unquestionedly had a fair trial on the record he stipulated and his own testimony and neither has pointed nor can point to any right under the Federal Constitution of which he was deprived. Otherwise this court is going to be called upon to interpret and construe *de nova* state ordinances, statutes and constitutions and "to supervise and review the political administration of a state government by its own officials and through its own courts." (*Allen v. Georgia, supra*). Appellant had his day in court and was properly fired because he had abused his office.

VI.

Appellant's Point IV (Jurisdictional Statement, pp. 26-27) is not only wrong, it's fraudulent.

Appellant was not tried on two charges not contained in the statement of charges served on him. The third charge was: "That Louis L. Friedman has abused his public office as a Justice of the Supreme Court of the State of New York, Second Judicial District * * * (3) by violating and failing to observe the concept, spirit and letter of the canons of judicial ethics, and by causing M. Malcolm Friedman to violate and to fail to observe the canons of professional ethics." Appellant knew that this charge covered the so-called Shevack matter and the failure to report income tax matter which were tried at length in the disciplinary proceedings against his brother, the record in which gave cause for the Presiding Justice of the Appellate Division, Second Judicial Department, to request the convening of a Court on the Judiciary and for the initiation of these proceedings. As has been pointed out appellant did not ask for or need a bill of particulars as to the scope of the third charge. He had the record and the report in the proceeding involving his brother and he knew that the practicing law and income tax matters were covered thereby. In the extended and battling negotiations between counsel designated to conduct the proceedings and appellant's counsel as to what parts of the record made in M. Malcolm Friedman disciplinary proceeding would be stipulated as part of the record in this proceeding appellant was well aware that charge Number 3 covered the Shevack and income tax matters. That is why appellant moved to have those matters deleted from the charges and eliminated from the case. Furthermore, after the denial of that motion appellant stipulated that the parts of the record in his brother's disciplinary proceeding relevant to those issues be made the record herein upon those

issues. Those issues were not as appellant says "added and allowed by the Court over objection on December 10, 1962" (Jurisdictional Statement, p. 27). They were matters which, as appellant knew, prompted the call for the convening of a Court on the Judiciary.

Again significantly appellant cites no authority for his assertion that he was denied due process in this respect. While the nature of the notice given to the New York Legislature of the charges preferred against appellant raises no federal question, it should be noted that the New York Constitution does not require the Presiding Judge of the Court on the Judiciary to do more than "give written notice to the governor, the president of the senate and the speaker of the assembly of the name of the judicial officer against whom such charges have been preferred, of the nature of the charge and the date set for the trial thereof." This was done. Neither the specifications nor the evidence upon which the charges were based had to be submitted. The charges were preferred against appellant upon the basis of a public record and if the Legislature had deemed it warranted to prefer the same charges against appellant on the basis of that public record it could have done so.

VII.

Appellant's Point V (pp. 27-29), presents no federal question and is irrelevant.

The fact that under state law appellant could have been removed from office upon the same evidence considered by the Court on the Judiciary by other state procedures, as shown in the appendix hereto, raises no federal question and is irrelevant. He was removed and properly removed

under established state procedure which conformed in every respect with the requirements of due process under the Federal Constitution.

VIII.

The answer to Appellant's Point VI is that the right of an appeal on the merits is not guaranteed or mandated by the due process clause of the Federal Constitution so long as the denial of a right of appeal is not discriminatory.

"While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process" (*National Union of Marine Cooks v. Arnold*, 348 U. S. 37, 43 and cases cited). The New York Constitution provides no right of review by another State Court of an order and judgment of the Court on the Judiciary and in the absence of such a provision there is no right to appeal therefrom to another state court (*Matter of Droege*, 197 N. Y. 44; *Ex Parte Johnson*, 3 Cow. 371; *In the Matter of Louis L. Friedman*, 19 A. D. 2d 120, Appendix D to the Jurisdictional Statement). See the New York Constitutional History of Removal of Judicial Officers attached hereto as Appendix I.

CONCLUSION.

No substantial federal question is presented by this appeal and this Court should either grant the motion to dismiss or the motion to affirm.

Respectfully submitted,

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JOHN R. DAVISON,
Counsel Designated to Conduct the Proceedings,
90 State Street,
Albany 7, New York,

and

WILLIAM R. BRENNAN,
Counsel Designated to Conduct the Proceedings,
295 Main Street,
Buffalo 3, New York.

APPENDIX I.

New York Constitutional History of Removal of Judicial Officers.

The First Constitution of New York, adopted April 20, 1777, provided for a Court for the Trial of Impeachments, consisting of the President of the Senate, the Senators, Chancellor and Judges of the Supreme Court. The power of impeachment, i. e., to institute a removal proceeding, was vested in the assembly and two-thirds of its members present had to consent to such impeachment (Sections XXXII and XXXIII). Implicit in these provisions were the requirements for a charge, service of notice thereof, and an opportunity to be heard. (See Section XXXIV which provided that the party impeached should be allowed counsel.) There was no provision expressed or implied in that Constitution for review of a determination of the Court for the Trial of Impeachments.

The Second Constitution of New York, framed in 1821 and approved by the people and effective in 1822, contained similar expressed and implied provisions except that an impeachment required the concurrence of a majority of all of the members elected to the Assembly (Article V, Sections 1 and 2). In addition, that Constitution provided in Article IV, Section 7, that a justice of the peace could be "removed by the county court, for causes particularly assigned by the judges of the said court. And no justice of the peace shall be removed until he shall have notice of the charges made against him, and an opportunity of being heard in his defense" (Justices of the courts in the City of New York were removable in like manner under Section 14). Under that Constitution judges of the county courts and recorders of cities could be removed by the Senate on recommendation of the Governor for causes stated in such recommendation (Article V, Section 6).

That Constitution also provided in Article I, Section 13 that: "All officers holding their offices during good behavior may be removed by joint resolution of the two houses of the legislature, if two-thirds of all the members elected to the assembly and a majority of all of the members elected to the senate, concur therein." Under this provision, the Legislature had the power to remove a judge without assigning any reason therefor or giving him an opportunity to be heard (Lincoln, Vol. IV, p. 562). Its purpose was to secure responsibility where judges were not liable to impeachment, i. e., in cases of impairment of faculties by casualty, sickness, infirmity and intemperance (Debates, p. 443). There was no provision in the Second Constitution for review of a determination of a body vested thereby with the power to remove a judicial officer and in *Ex Parte Johnson*, 3 Cow. 371, it was held that the Supreme Court of New York had no power to review a determination of the County Court under Article IV, Section 7.

The Second Constitution was amended in 1845 so as to provide that no judicial officer should be removed by joint resolution by the two houses of the legislature or by the senate upon recommendation of the Governor unless the cause of such removal was entered on the journal of both houses or of the senate, as the case might be, and the judicial officer was served with a copy of the causes alleged for his removal and was afforded an opportunity to be heard in his defense (New York State Constitution, Annotated, Constitutional Convention Committee 1938, Vol. I, Part II, p. 43).

The Third Constitution of New York, approved by the peachments composed of the president of the senate, the people in 1846, continued the impeachment power of the assembly by vote of the majority of all of the members elected and provided for a Court for the Trial of Imsenators, or a majority of them, and the judges of the

court of appeals or a majority of them. Conviction required concurrence of two-thirds of the members of the court present (Article VI, Section 1). Section 11 of Article VI of that Constitution provided that justices of the supreme court and judges of the court of appeals could be removed by a concurrent resolution of both houses of the legislature upon the concurrence of two-thirds of the members elected to the assembly and a majority of the members elected to the senate. All other judicial officers, except justices of the peace and judges and justices of inferior courts not of record, could be removed by the Senate upon recommendation of the Governor. But, no removal could be made under that section unless the party complained of had been served with a copy of the complaint against him and had opportunity to be heard in his defense. Justices of the peace and judges and justices of inferior courts not of record could be removed after due notice and opportunity to be heard by such county, city or state courts as prescribed by law for causes assigned in the order of removal (Article VI, Section 17).

In his Constitutional History of New York, Lincoln says that before the Governor could make a recommendation for removal of a judicial officer he had to conduct a preliminary proceeding and give the accused officer an opportunity to be heard (Lincoln, Vol. IV, p. 588).

The Judiciary Article of the Third Constitution was amended with the approval of the people in 1869. Section 1 of the amendment continued the impeachment power of the assembly by vote of a majority of its elected members and provided for a court for the Trial of Impeachments, composed of the president of the senate, the senators or a majority of them and the judges of the court of appeals or a majority of them. By Section 11 of that amendment, judges of the court of appeals and justices of the supreme court could be removed by concurrent resolution of both houses of the legislature if two-thirds of the elected mem-

bers of each concurred. All other judicial officers, except justices of the peace and judges and justices of inferior courts not of record, could be removed by the Senate on the recommendation of the Governor, if two-thirds of the elected members concurred. But no removal could be had under that section unless the party complained of had been served with a copy of the charges against him and had opportunity to be heard. Under Section 18 justices of the peace and judges or justices of inferior courts not of record could be removed after due notice and opportunity to be heard by such courts as prescribed by law.

The Fourth Constitution of New York, adopted by the people in 1894, by Article VI, Sections 11, 13 and 17 continued by like provisions, the foregoing power of removal by concurrent resolution of both houses of the legislature or by impeachment and trial of judges of the court of appeals and justices of the supreme court. All other judicial officers, except justices of the peace, and judges or justices of inferior courts not of record, could be removed by the senate on recommendation of the Governor if two-thirds of the members elected concurred. But, where removal was by concurrent resolution or by the senate on the recommendation of the Governor the cause for removal had to be entered in the journals, "a statement of the causes alleged" served, and an opportunity to be heard given. Removal of justices of the peace and judges or justices of inferior courts not of record could be for cause, if due notice and opportunity of being heard were given, by such courts as prescribed by law. The phrase "a statement of the causes alleged" was substituted for the word "charges" to insure that removal could be because of illness or incapacity as well as because of dereliction (Lincoln, Vol. IV, p. 566). No provision was contained in the Fourth Constitution for review of a determination made by a body thereby vested with the

power of removal of a judicial officer and in *Matter of Droege*, 197 N. Y. 44, the Court of Appeals held that it had no power to review a determination of the Appellate Division removing a city magistrate from office under Article VI, Section 17.

The Judiciary Article of the Fourth Constitution was amended with the approval of the people in 1925. By Section 9 of that amendment, judges of the court of appeals, and justices of the supreme court could be removed by concurrent resolution of both houses of the legislature, if two-thirds of the elected members of each concurred. All other judicial officers, except justices of the peace, justices of the municipal court of the city of New York and judges and justices of inferior courts not of record, could be removed by the senate, on the recommendation of the Governor, if two-thirds of the members concurred. But, no officer could be removed under that section except for cause entered upon the journals and unless he had been served with the statement of the cause alleged and had opportunity to be heard. Section 10 of that amendment continued the assembly's power of impeachment and provided for a court for the Trial of Impeachments composed of the president of the senate, the senators or a majority of them and the judges of the court of appeals or a majority of them. Under Section 17 of that amendment justices of the peace, justices of the municipal court of the city of New York and judges or justices of inferior courts not of record could be removed for cause after due notice and opportunity of being heard by such courts as prescribed by law.

The Constitutional Convention of 1938 in submitting a proposed whole Constitution (the Fifth) to the voters at the general election on November 8, 1938 divided it into 9 propositions, the 5th of which covered the Judiciary Article. This 5th proposal was rejected by the people. Part of this proposal included the following:

"Notwithstanding the foregoing provisions a justice of the supreme court, a judge of the court of claims, a surrogate or special surrogate, a judge of a court of general sessions, a county judge or special county judge, or a justice of the city court of the city of New York, may be removed for cause or may be retired for permanent mental or physical disability preventing the performance of his judicial duties, by the court of appeals, either upon its own motion or upon the recommendation of the appellate division of the department within which the justice, judge or surrogate resides, provided, however, that no justice, judge or surrogate shall be so removed or retired unless he shall first have been served with a written notice of the proceeding therefor and a statement of the cause or disability alleged and shall have been given an opportunity to be heard. Removal for cause shall be upon the concurrence of five of the elected judges of the court of appeals" (Vol. IV of the Revised Record of the 1938 Convention, p. 3433).

The debates of the 1938 Constitutional Convention show the following reasons for this proposal:

"Mr. Sears: * * * This proposal came to the Convention on the recommendation of the Bar Associations or some of them in New York City. It was thought that it was beneficial to the judiciary to have this power to remove in the Court of Appeals, where it would not be involved in the controversies of the Legislature and the politics there involved, and it would give to the person who was incapacitated a right to be retired and the recommendation as it came is that the Legislature should provide for compensation for such retiring judges. This whole proposal was looked upon as being for the benefit of the judicial personnel." * * * (p. 2011).

"Mr. Foley: * * * I think this is a very salutary provision. I think it will shorten the process very much. There are very few cases; I do not

know of any case in the last 25 years in which a judge was impeached or removed by the Legislature." * * * (p. 2014).

"Mr. Martin: * * * I think this is one of the most important provisions to put in the judiciary law. At the present time if a judge is incapacitated, and there are judges incapacitated for two and three years, and nobody wants to go to the trouble of starting an impeachment proceeding against them, nobody wants to harm them, this hearing would have the effect of being a private trial. It would not be spread all over the country and it would have the double effect if a judge is impeached this ends his right to salary. He can never get another dollar. And under this provision, if he should be retired, he could be retired at any compensation that the Legislature would fix.

"There has been a widespread demand that something be done along this line, and this is not only the safest way but the best way for any judge who is incapacitated and unable to do his work to be taken care of" (p. 2014).

"That was put in there so that, if there was any question of the mental or physical disability or inability of the judge to do the work, and it was claimed that it was not physical or mental, they could remove him for cause." * * * (p. 2015).

"Mr. T. J. Curran: Was it the intention of the Court of Appeals in holding such a hearing, where a man was to be removed for cause, that they would hold a private hearing.

"Mr. Martin: That would be entirely within the discretion of the Court of Appeals. If they were given the power to hold the hearing they would have to decide whether it would be private or public, the way the courts do today" (p. 2015).

"Mr. Sears: I take the word 'cause' in this section to be the same wherever it occurs. The removal by the Legislature is to be for cause and the person charged with the delinquency or cause must have an opportunity to be heard. It is exactly the same with respect to the right here given to the

Court of Appeals. I suppose that if the person charged asked the Court of Appeals to have a hearing in private, that would be granted. I suppose the Court of Appeals has judgment enough to know what should be done under such circumstances. If the person charged with cause wanted a public hearing, can you imagine the Court of Appeals denying it to him? I cannot. I feel that we can trust the Court of Appeals in this matter. The man who is charged with a cause has a right to be heard, that is, to produce his evidence, and every protection is afforded to him by this article and, further, it enables the judicial system to attend to the elimination from the personnel all persons who may be charged with delinquency. That is all it does. Because there has not been any case in the Legislature for 25 years is no reason why we should not provide for this case a proper case for such action may arise" (p. 2017).

"Mr. Sears: * * * the people who proposed this had in mind those cases where, perchance, the incompetent did not realize his situation or could not accede to it, although it might be perfectly clear to everyone else, or perchance was mentally incompetent and could not file a resignation. All those situations are covered in this simple provision, and I earnestly hope that this will not be stricken from the judiciary article" (p. 2018).

"Mr. Martin: Doing him a favor by removing him if he is incompetent or has become insane as has happened before to judges sitting on the bench, not able to comprehend their condition and not able to do anything about it. Nobody is going to impeach them, and this provision was made to meet such a condition" (2018).

This proposal did not then become a part of our Constitution because of the rejection by the people of the entire Judiciary Article proposed by the 1938 Convention. But there is no claim, or ground for such claim, that this particular proposal had anything to do with the people's rejection of the proposed Judiciary Article.

Adoption of Present Provision.

The Constitution was amended by necessary action of the legislature and by adoption by the people on November 4, 1947, effective January 1, 1948, so as to include in the Judiciary Article, Section 9-a. This amendment contained the substantive provisions now contained in Section 22 of Article VI of the Constitution adopted by the people November 7, 1961, effective September 1, 1962, quoted above.

In addition to the provisions quoted above, the Judiciary Article of the present Constitution contains provisions in Section 23 for removal of judges of the court of appeals and justices of the supreme court by concurrent resolution of both houses of the legislature by a two-thirds vote of the members elected to each house. That section also provides for the removal of judges of the court of claims, the county court, the surrogate's court, the family court and the courts of the city of New York, the district court and such other courts as the legislature might determine by the senate on the recommendation of the governor if two-thirds of the members elected to the senate concur. However, no judge or justice can be removed under that section except for cause entered on the journal and unless he shall be served with a statement of the cause alleged and shall have opportunity to be heard. Section 24 of the present Constitution gives the assembly the power of impeachment by a vote of a majority of the members elected thereto and provides for a court for the Trial of Impeachments composed of the president of the senate, the senators or a majority of them and the judges of the court of appeals or a majority of them.

In summary we have in our present state Constitution substantially the same procedure for removal from office of a justice of the supreme court by the impeachment

method first provided in the Constitution of 1777 and by the joint resolution method first provided in the Constitution of 1822 and since 1948 we have had an alternative and less cumbersome procedure of removal by a Court on the Judiciary designed not only to permit removal for cause involving ethical considerations but also for mental and physical incapacity.

The significance of this history of the New York Constitutional procedures for removal of judicial officers is that it shows that this state has from its very beginning made provision for such removal by a fair and impartial procedure and that there never has been any provision in any constitution of the State of New York for review by a State Court of a determination of a body vested with the power to remove a judicial officer for cause after notice and hearing.

The only cases directly in point are those previously cited: *Matter of Droege*, 197 N. Y. 44 and *Ex parte Johnson*, 3 Cow. 371, both of which held that a determination made by a body vested with the constitutional power of removal of a judicial officer is *not* reviewable by a court of this state. See, also, *Matter of Friedman*, 19 A. D. 2d 120.

In *Matter of Droege*, the question was whether the Court of Appeals had jurisdiction to review a determination made by the Appellate Division ordering the removal of Droege from the office of City Magistrate under the provisions of what was then §17 of Article VI of the New York Constitution. In dismissing the appeal the Court of Appeals said (197 N. Y. 44, 51-52):

> "Quite apart from definitions and legal nomenclature, we regard this as a proceeding in which we cannot assume jurisdiction without substituting our judgment and discretion for that of the Appellate Division. That court is vested with the power of removal 'for cause.' Neither the Constitu-

> tion nor the statutes have attempted to define what that 'cause' shall be. If this court should undertake to decide upon the sufficiency or insufficiency of a 'cause' passed upon by the Appellate Division in such a case it would be an assumption of power by this court, which the Constitution and the statutes have granted exclusively to the Appellate Divisions. The case at bar is not to be distinguished from *Ex parte Johnson* (3 Cow. 371). The Constitution of 1821 provided that justices of the peace might be removed by the County Court for causes particularly assigned by the judges of that court. In *Johnson's* case an application was made to have him removed from the office of justice of the peace for making a false return to a certiorari, and for keeping his office in a grog shop. The County Court denied the application by simply refusing to consider the matter. Upon application to the Supreme Court for a writ of mandamus to compel the County Court to take cognizance of the matter, the Supreme Court said, *per curiam:* 'The whole was a mere matter of discretion with the Common Pleas. Under the Constitution (art. 4 §7) they are the sole judges whether they will notice the charges preferred or not. They hold a constitutional power, with which we will not interfere.' For these reasons the appeal should be dismissed."

The courts of New York State have not undertaken to review an exercise by the Legislature of its power of removal of a judicial officer. In fact, there have been only two instances in which the Legislature has exercised that power:

1872 John H. McCunn: Justice of the Superior Court of the City of New York. Assembly judiciary committee investigated charges and transmitted a report to the governor with a request that "it be recommended to the senate to take proceedings for the removal of said John H. McCunn from his office of justice of the superior court of the city of New York." At an extra session of the senate the proposition received 28 affirmative votes, and

there were no votes in the negative. Justice McCunn was removed from office (4 Lincoln, Constitutional History of N. Y. [1906] 585-6; 6 Messages from the Governor [N. Y.] [1909] 498).

1872 George G. Barnard: Justice of the Supreme Court. Articles of impeachment and trial. He was found guilty, removed from office, and declared to be disqualified from holding any office of honor, trust, or profit (4 Lincoln, Constitutional History of N. Y. [1906] 605, 607).

The courts of New York State have not undertaken to review an exercise of the power vested in a court of this state of removal of a judicial officer for cause. As shown above, *Matter of Droege* and *Ex parte Johnson* hold that a determination of a court vested with such constitutional power is not reviewable by other state courts, absent a constitutional provision for such a review.

There is one case, however, which needs explanation, *Matter of Levy*, 229 N. Y. 637. In that case an appeal was taken to the Court of Appeals from an order of the Appellate Division overruling an objection of a Justice of the Municipal Court of the City of New York to the jurisdiction of the Appellate Division to entertain charges preferred against him to effect his removal. After denying his motion to dismiss charges made against him on the ground that the Court had no jurisdiction to entertain the same the Appellate Division certified to the Court of Appeals the following question: "Has the Appellate Division of the Supreme Court, first department, jurisdiction to remove respondent, Aaron J. Levy, from his office as a justice of the Municipal Court of the city of New York, or to entertain any charges preferred against him to effect such removal."

As shown above, the Fourth Constitution adopted in 1894 (involved in the *Levy* case) provided that removal of a justice of an inferior court not of record could be for cause by such courts as prescribed by law. The Municipal Court of the city of New York was at the time of the adoption of the Constitution of 1894 a statutory inferior local court and not a court of record and under §132 of the Code of Criminal Procedure the power to remove justices thereof for cause was vested in the Appellate Division (Laws of 1909, Chapter 66; Laws of 1901, Chapter 466, §1383; Laws of 1907, Chapter 603).

In 1915 after the adoption of the Municipal Court Act by Chapter 279 of the Laws of that year, §1383 of the Revised Greater New York Charter was amended by Chapter 581 of the Laws of that year by omitting the word "justices" from the section vesting in the Appellate Division the power of removal of officers of the Municipal Court and Chapter 279 of the Laws of that year made the Municipal Court a court of record. Justice Levy contended that the Appellate Division had no jurisdiction of the charges preferred against him to effect his removal because by Chapter 279 of the Laws of 1915 the Municipal Court was made a court of record.

The Appellate Division held in the *Levy* case (192 App. Div. 550) that the Municipal Court being an inferior court not of record at the time of the adoption of the Constitution, the justices thereof could be removed by the Appellate Division and that "* * * the Legislature could not directly or indirectly deprive it of any of the jurisdiction so conferred and possessed."

It was on this ground that the Appellate Division denied Justice Levy's motion to dismiss the charges made against him.

Being in doubt, however, of the correctness of its interpretation of the constitutional provision, the Appellate Division certified to the Court of Appeals the foregoing question. The Court of Appeals answered the question in the affirmative.

An examination of the record on the appeal to the Court of Appeals from the order of the Appellate Division in that case will show that no question was raised as to the power of the Court of Appeals to consider the certified question. Having been asked by the Appellate Division for an answer to the certified question as to the jurisdiction of the Appellate Division, the Court of Appeals treated the appeal to it as one in a proceeding as to which it had jurisdiction to advise the Appellate Division of its power under the Constitution. In so answering the certified question, the Court of Appeals held that the Legislature did not deprive the Appellate Division of the power to remove justices of the Municipal Court by making that court a court of record subsequent to the adoption of the Constitution.